

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AUG 27 1992
OFFICE OF THE CLERKCSX TRANSPORTATION, INC.,
Petitioner,
v.LIZZIE BEATRICE EASTERWOOD,
*Respondent.*LIZZIE BEATRICE EASTERWOOD,
Petitioner,
v.CSX TRANSPORTATION, INC.,
*Respondent.*On Writs of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

JOINT APPENDIX

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August 27, 1992

PETITION FOR CERTIORARI FILED NOV. 15, 1991
 CROSS PETITION FOR CERTIORARI FILED NOV. 16, 1991
 CERTIORARI GRANTED JUNE 29, 1992

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**CHRONOLOGICAL LIST OF RELEVANT
DOCKET ENTRIES**

1. June 3, 1988—Complaint filed in U.S. District Court for the Northern District of Georgia
2. July 13, 1988—Stipulation Extending Time to Answer or Respond filed in U.S. District Court for the Northern District of Georgia
3. August 8, 1988—Answer filed by CSX Transportation, Inc. in the U.S. District Court for the Northern District of Georgia
4. December 19, 1989—Motion for Summary Judgment with Statement of Material Facts and Supporting Brief filed by CSX Transportation, Inc. in the U.S. District Court for the Northern District of Georgia
5. January 5, 1990—Response in Opposition to Motion for Summary Judgment filed by Lizzie B. Easterwood in the U.S. District Court for the Northern District of Georgia.
6. January 22, 1990—Objections to Plaintiff's Affidavits or Portions Thereof filed by CSX Transportation, Inc. in U.S. District Court for the Northern District of Georgia
7. January 22, 1990—Reply Brief to Response of Lizzie B. Easterwood filed by CSX Transportation, Inc.
8. February 9, 1990—Order Granting Lizzie B. Easterwood's Request for Oral Argument on Motion for Summary Judgment entered in the U.S. District Court for the Northern District of Georgia
9. April 4, 1990—Transcript of Oral Argument and Hearing on Motion for Summary Judgment filed in the U.S. District Court for the Northern District of Georgia
10. August 9, 1990—Order Granting Motion for Summary Judgment and Denying Lizzie B. Easterwood's Motion for Reconsideration entered in the U.S. District Court for the Northern District of Georgia

11. September 6, 1990—Notice of Appeal filed by Lizzie B. Easterwood in the U.S. District Court for the Northern District of Georgia
12. June 20, 1991—Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action File No. 4:88-CV-0141-RLV

Mrs. LIZZIE BEATRICE EASTERWOOD,
Plaintiff,
vs.

CSX TRANSPORTATION,
Defendant.

COMPLAINT AND DEMAND FOR JURY TRIAL

[Filed June 3, 1988]

The complaint of Mrs. Lizzie Beatrice Easterwood respectfully shows unto the Court the following case:

1.

Plaintiff names as defendant CSX Corporation which is a foreign railroad corporation with its home office located at One James Center, Richmond, Virginia 23261.

2.

Plaintiff shows that on February 24, 1988, she was married to Thomas Ray Easterwood and lived with him at Habersham Estates, Cartersville, Georgia.

3.

Plaintiff shows that she is a resident of Bartow County, Georgia.

4.

Plaintiff shows that on the 24th day of February, 1988, her husband was struck and killed by a speeding train at the Cook Street crossing of defendant's railroad track in the City of Cartersville, Bartow County, Georgia.

5.

Plaintiff shows that at said time and place her deceased husband was lawfully upon the crossing driving a certain 1985 International truck owned by his employer, Duncan Wholesale Company, Inc.

6.

Plaintiff shows that the intersection named above is a very busy intersection in the City of Cartersville, Georgia, and that at the time of her decedent's death it was approximately 8:52 a.m.

7.

Plaintiff shows that on said date her deceased husband was 58 years of age and in excellent health.

8.

Plaintiff shows that the death of her husband was the direct and proximate result of the negligence of defendant in the following particulars:

(a) Defendant's train crew was operating the train at a speed that was greater than reasonable and safe at that time and place.

(b) Defendant's crossing was unsafe in that Defendant's crossing was at the top of a hump in Cook Street that caused drivers to have difficulty in crossing it.

(c) Defendant's crossing was unsafe in that Defendant's right of way on the west side of the track north of the intersection was permitted to be covered by heavy

vegetation obscuring the vision of drivers on Cook Street of approaching trains and of approaching drivers on Cook Street to operators of trains on defendant's track.

(d) Defendant's crossing was unsafe in that the crossing is adjacent to a busily traveled thoroughfare known as Tennessee Street which is also a State Highway.

(e) Defendant's crossing was unsafe in that it is just a few feet west of the connection between Tennessee Street and Cook Street where traffic constantly turns from one to the other in different directions.

(f) Defendant's crossing was very very rough and uneven.

(g) Defendant failed to maintain adequate warning devices at the crossing to warn plaintiff's decedent and other drivers of the approach of speeding trains from the north.

9.

As a result of the negligence of defendant in the maintenance of its crossing and operation of its train, plaintiff's husband was killed, and she is entitled to be compensated in money damages for her loss in an amount in excess of \$10,000, exclusive of interest and costs, by defendant and in such an amount as may be determined by a jury that will fairly compensate her for the full value of the life of her deceased husband.

WHEREFORE, Plaintiff demands judgment in an amount to be determined by a jury that will fairly compensate her for the full value of the life of her deceased husband, Thomas Ray Easterwood.

PARKER AND LUNDY

By: /s/ James I. Parker
JAMES I. PARKER—562600

By: /s/ William L. Lundy, Jr.
 WILLIAM L. LUNDY, JR.
 461185
 Attorneys for Plaintiff

P.O. Box 1018
 Cedartown, Georgia 30125
 404-748-5643

IN THE UNITED STATES DISTRICT COURT
 NORTHERN DIVISION OF GEORGIA
 ROME DIVISION

Case No. 4:88-cv-0141-RLV

Mrs. LIZZIE BEATRICE EASTERWOOD,
Plaintiff,
 vs.

CSX TRANSPORTATION, INC.,
Defendant.

ANSWER OF CSX TRANSPORTATION, INC.

[Filed Aug. 8, 1988]

Comes Now CSX Transportation, Inc. ("CSXT"), defendant in the above-styled matter, and by way of Answer shows the Court the following:

FIRST DEFENSE

Plaintiff's Complaint fails to state a claim against this defendant upon which relief can be granted.

SECOND DEFENSE

Plaintiff's Complaint against CSXT is barred for the reason that the collision described in said Complaint, and the death of Thomas Ray Easterwood, together with any and all other alleged injuries, were caused solely, proximately and directly by the negligence of plaintiff Thomas Ray Easterwood.

THIRD DEFENSE

Plaintiff's Complaint against this defendant is barred by the reason that the collision described in the Complaint, and the death of Thomas Ray Easterwood, to-

gether with all injury and damage alleged, was caused solely, proximately and directly by the failure of Thomas Ray Easterwood to comply with O.C.G.A. § 40-6-140 and stop the vehicle he was driving short of the railroad grade crossing when electrical signal devices warned of the immediate approach of the train, and when the train was plainly visible and in hazardous proximity to the crossing, said failures constituting negligence *per se* on the part of Thomas Ray Easterwood.

FOURTH DEFENSE

Plaintiff's Complaint against this defendant is barred by reason of the fact that the negligence of Thomas Ray Easterwood was equal to or greater than any alleged negligence on the part of CSXT which latter alleged negligence is expressly denied by CSXT.

FIFTH DEFENSE

Plaintiff's Complaint against CSXT is barred for the reason that any damage, death or injury alleged in the Complaint were the result of an unavoidable accident.

SIXTH DEFENSE

Plaintiff's Complaint against CSXT is barred by reason of the doctrine of avoidance.

SEVENTH DEFENSE

Plaintiff's Complaint against CSXT is barred by reason of the fact that Thomas Ray Easterwood had the last clear chance to avoid the incident alleged in the Complaint and that plaintiff is therefore barred from recovery of the damages sought in the Complaint.

EIGHTH DEFENSE

Except as specifically admitted hereinafter, CSXT denies the allegations of plaintiff's Complaint, and each and every claim contained therein. Specifically answering the

allegations of plaintiff's Complaint, CSXT shows the Court the following:

1.

Responding to the allegations contained in paragraph 1 of the Complaint, CSXT states that the Complaint erroneously names CSX Corporation as defendant. By consent order, CSXT has been substituted as defendant and CSX Corporation dismissed. CSXT states by way of further response that it is a foreign corporation with its principle place of business in a state other than Georgia, and is authorized to do business in this state and in this district.

2.

CSXT is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 and can neither admit or deny the same.

3.

CSXT is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 and can neither admit or deny the same.

4.

Responding to the allegations contained in paragraph 4, CSXT admits only that Thomas Ray Easterwood was killed in a truck-train collision occurring on February 24, 1988 in Cartersville, Bartow County, Georgia. Except as thus stated, CSXT denies that its train was "speeding" as alleged, expressly denies each and every other allegation in said paragraph 4, and further denies that it is in any way liable to plaintiff for the collision alleged.

5.

CSXT denies that Plaintiff's husband was "lawfully upon the crossing" as alleged in said paragraph. CSXT is without knowledge or information sufficient to form a

belief as to the truth of the remaining allegations contained in paragraph 5 and can neither admit or deny the same.

6.

CSXT admits that the train-truck collision occurred at approximately 8:52 a.m. CSXT is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 6 and can neither admit or deny the same. CSXT, however, expressly denies that it is in any way liable to plaintiff for the collision or injury alleged.

7.

CSXT is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 and can neither admit or deny the same.

8.

CSXT denies each and every allegation in paragraph 8 of the Complaint and expressly denies all subparts (a) through (g) thereof.

9.

CSXT denies the allegations contained in paragraph 9 of the Complaint and expressly denies that it is liable to plaintiff in any amount.

10.

CSXT denies each and every other allegation in plaintiff's Complaint not herein specifically admitted.

WHEREFORE, CSXT prays that plaintiff's Complaint be dismissed with all costs cast upon plaintiff, and for such other and further relief as this Court deems just and proper.

This 5th day of August, 1988.

ALSTON & BIRD

By: /s/ Jack H. Senterfitt
JACK H. SENTERFITT
635850

By: /s/ Richard T. Fulton
RICHARD T. FULTON
280592

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(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action File No. 4:88-CV-0141-RLV

MRS. LIZZIE BEATRICE EASTERWOOD,
Plaintiff,
v.

CSX TRANSPORTATION, INC.,
Defendant.

AFFIDAVIT OF HAZEL STEPHENSON

STATE OF GEORGIA

COUNTY OF BARTOW

Personally appearing before the undersigned officer duly authorized to administer oaths, Hazel Stephenson, and after being first duly sworn, states as follows:

1.

My name is Hazel Stephenson. I am over the age of majority and competent to make this Affidavit. I give this Affidavit based upon my own personal knowledge and belief as to the matters stated herein.

2.

I was an eyewitness to the train-vehicle incident involving Mr. Easterwood. I was in a car directly behind Mr. Easterwood, and had been following him before we reached the South Erwin Street intersection with Cook Street.

3.

I noticed that Mr. Easterwood was driving very slowly the entire time. At the South Erwin Street and Cook Street intersection, both Mr. Easterwood and I had to stop at a red light. While we were stopped at the red light, I heard the noise of a train coming south and heard the bells at the Cook Street crossing and heard the train whistle even though my windows were closed. I heard all of this as we waited at the red light.

4.

Mr. Easterwood made a right-hand turn from South Irwin Street onto Cook Street and I followed behind him. As we turned onto Cook Street, I noticed that the red light at the train crossing was flashing. This entire time I continued to hear the noise of the train approaching and knew that a train was approaching the Cook Street crossing.

5.

I followed Mr. Easterwood down Cook Street toward the crossing. As Mr. Easterwood got closer to the railroad crossing, he did not increase or decrease his speed but simply continued to drive very slowly toward the crossing. I stopped my car at the white line painted on the Cook Street pavement that indicates where motorists should stop when a train is approaching. Mr. Easterwood, however, continued over this white line, onto the crossing and into the path of the train.

6.

I did not see Mr. Easterwood make any attempts to slow his truck or stop prior to entering the railroad crossing, even though it was obvious that a train was approaching that crossing. During this entire time the flashing lights were operating, the train was blowing its whistle and the bells were ringing. The train was not

travelling at an abnormally high rate of speed and there was nothing to obstruct the view of the train.

This 13th day of December, 1989.

FURTHER AFFIANT SAITH NOT.

/s/ Hazel Stephenson
HAZEL STEPHENSON

Sworn to and subscribed before me this 13th day of December, 1989.

/s/ [Illegible]
Notary Public

Notary Public, Barlow County, Georgia
My Commission Expires May 6, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action No. 4:88-CV-0141-RLV

MRS. LIZZIE BEATRICE EASTERWOOD,
Plaintiff,
v.

CSX TRANSPORTATION, INC.,
Defendant.

STATE OF GEORGIA
COUNTY OF FULTON

AFFIDAVIT

Personally appeared before me, the undersigned officer duly authorized to administer oaths, Mr. Wendall A. Hester, who deposes and states as follows:

I.

I am Wendall A. Hester, and I am over 18 years old of age. I am competent to make this affidavit and the statements herein are based on my personal knowledge and the records of the Georgia Department of Transportation kept under my supervision, direction, custody and control.

2.

I am employed by the State of Georgia in the Department of Transportation, Office of Traffic and Safety, as a Transportation Engineer IV.

3.

During the period of January 1, 1980 to the present, I served as Manager of the Department's Railroad-High-

way Grade Crossing Section. My major function was to administer the State and Federal funded Railroad Grade Crossing Safety Program. Part of our section's activities includes the inspection and evaluation of grade crossings on a state-wide basis, and the preparation of Diagnostic and Engineering Inspection Reports for each crossing inspected. This inspection report includes the computation of a hazard index which is one of the tools used to aid in evaluating the relative hazard of each crossing.

4.

When I began as manager of the Railroad Section in January of 1980, plans were already in progress to replace and upgrade the existing flashing light signals at the West Avenue railroad crossing in Cartersville, Georgia with the newer combination flashing light and gate assembly. In engineering the circuit design for West Avenue, it was determined that the new type motion detector equipment would not be compatible with the existing signal equipment at the adjacent crossings in close proximity. These included the Leake Street, Main Street, Cherokee Street, and Cook Street crossings in Cartersville, Georgia. Therefore, it was decided to initiate projects to upgrade the flashing light signals and circuitry at these crossings.

5.

Plans for modifying the crossing signals at Leake Street, Main Street, and Cherokee Street were submitted to the Railroad in August of 1980. The new signals which included new circuitry and the combination flashing light gate assembly were installed at these crossings in December of 1981. These new signals were funded through our Federal and State Railroad Crossing Safety Program.

6.

Plans for upgrading the crossing signals at Cook Street were drawn up at the same time as the Leake Street,

Main Street and Cherokee Street crossings. However, because of the large crossing width, gates could not be designed to cover the crossing without constructing a traffic island in the street. Our plan for installing gates at the Cook Street crossing was submitted to the City of Cartersville through our District Office. This was necessary because Cook Street is a city street. The City rejected the plan as being too restrictive to the large volume of trucks using the crossing and therefore the plan was not submitted to the Railroad. Instead, we determined to leave Cook Street protected by the existing cantilever flashing light warning device.

7.

At the suggestion of the Railroad, we approved the Railroads' upgrade of the motion detector at Cook Street. This upgrade in equipment at Cook Street was desirable to insure frequency compatibility with the automatic detection devices installed at the adjacent West Avenue crossing and the cost for this upgrade was included in the estimated costs proposal prepared by the Railroad for the West Avenue crossing improvements and authorized and approved by my section. This cost estimated, No. 1534, was submitted to us on January 17, 1980 and was subsequently approved.

8.

Further affiant sayeth not.

This 30 day of November 1989.

/s/ Wendall A. Hester
WENDALL A. HESTER

Sworn to and subscribed before me, this 30th day of November, 1989.

/s/ Melinda R. Boothe

Notary Public

My Commission Expires: —

Notary Public Cobb County, Georgia

My Commission Expires Aug. 29, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action File No. 4:88-CV-0141-RLV

MRS. LIZZIE BEATRICE EASTERWOOD,

Plaintiff,

v.

CSX TRANSPORTATION, INC.,

Defendant.

AFFIDAVIT OF W. D. MURRAY

STATE OF GEORGIA

COUNTY OF FULTON

W. D. Murray, on oath first having been duly sworn, depose and say the following:

1.

I am Roadmaster for CSX Transportation, Inc. ("CSXT"). The facts contained in this affidavit are of my own personal knowledge and based upon the knowledge of the operations and records of CSXT, and are true and correct. I am over 21 years of age and competent to give this affidavit for any use in the above styled case.

2.

My responsibilities include supervision of the engineering and maintenance functions of CSXT for that portion of the Atlanta Division which includes CSXT's main line track in Cartersville and specifically the Cook Street crossing.

3.

CSXT has installed train signals along its main line track including this location. This main line track is Class 4 track, and was Class 4 track as of February 24, 1988, which has a maximum allowable operating speed for freight trains of 60 miles per hour.

4.

Further affiant sayeth not.

/s/ W. D. Murray
W. D. MURRAY

Sworn to and subscribed before me this 13 day of December, 1989.

/s/ [Illegible]
Notary Public

Notary Public, Georgia, State at Large
My Commission Expires August 26, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action No. 4:88-cv-0141-RLV

MRS. LIZZIE B. EASTERWOOD,
Plaintiff,
vs

CSX TRANSPORTATION, INC.,
Defendant,

APPEARANCES:

FOR THE PLAINTIFF:

William L. Lundy, Jr., Cedartown, Georgia

FOR THE DEFENDANT:

Jack H. Senterfitt, Esq., Atlanta, Georgia

The DEPOSITION OF VIRGIL PRATHER was taken at the instance of the plaintiff at the law offices of Aiston and Bird, 100 Galleria Parkway, Marietta, Georgia, commencing at approximately eleven o'clock a.m., on the 19th day of December, 1988, before Brenda G. Watson, Notary Public and Court Reporter, pursuant to the stipulations of counsel.

Q Okay. Can you tell me how fast you were going on February 24th, 1988, just prior to the impact?

A Approximately thirty-two miles an hour.

Q What do you base that speed on?

A Just prior to reaching the crossing, I looked at the speed recorder, which the engine—was available, and it was registering thirty-two miles per hour.

Q Okay. Now this speed recorder, can you please describe it for me.

A It is a thing that all the engines have. It is something like you would refer to as a speedometer on an automobile. But they refer to it as a speed recorder. It is basically just the same thing as a speedometer. It does not record the speed officially. I mean as far as making any kind of recording.

Q So how do you tell that thirty-two is the speed? Is it from a tape or a readout, or what is it you are looking for?

A By hand signal—a hand indication, like a—well, just like your speedometer, you know, on an automobile, basically the same thing.

Q Okay. Is there a continual recording of the speed as you travel down the track?

A You mean a declining or increase?

Q Either one?

A Yes.

Q Okay. Is that done on paper?

A No.

Q Or how is that recorded?

A No. There is no recording that you can go back and check.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action File No. 4:88-CV-014T-RLV

MRS. LIZZIE B. EASTERWOOD,
Plaintiff,
vs

CSX TRANSPORTATION, INC.,
Defendant,

The **DEPOSITION OF JIM F. KELLEY**; taken by the Plaintiff; before Tracy A. Cooper, Certified Court Reporter and Notary Public; commencing at approximately 2:00 p.m., on January 27, 1989, in the offices of Greg Culverhouse, Cartersville, Georgia.

APPEARANCES

FOR THE PLAINTIFF:

William L. Lundy, Esquire

FOR THE DEFENDANT:

Theodore T. Carellas, Esquire
Richard T. Fulton, Esquire

* * * *

[6] Q You are still working for CSX?

A Yes.

Q What is your capacity now?

A Supervisor of signals.

Q What does that mean exactly, supervisor of signals?

A I'm in charge of the maintenance on the train control and traffic control devices.

Q And do you remember about what time you arrived at the scene of this wreck?

A I don't recall the exact time, no.

Q Do you think it was before lunch time?

A It was before I had lunch.

Q And was locomotive engine 3120 still below the Cook Street crossing when you arrived?

A No, it was not.

Q It had already been removed?

A Yes.

Q Now, why do you go to scenes of train/motor vehicle wrecks at grade crossings to investigate? Or it is to investigate the signal devices?

A To see that they are functioning as intended, yes.

* * * *

[10] Q It doesn't depend on the weight of the locomotive engine to trip these warning devices?

A The weight—locomotive is so heavy, there are not different weights—light ones or some are heavier than others.

Q Doesn't have an effect on that?

A No, they all activate it.

Q Is the phase motion detector located before the crossing—can you tell me how far back from the actual grade crossing these phase motion detectors are located?

A The phase motion detector is located at the crossing.

Q What is it that's located before the crossing?

A It's the circuit termination shunts which are located approximately 1500 feet from the crossing.

Q Is that a consistent figure for all signal warning devices, 1500 feet before a grade crossing?

A It depends upon the application in each instance.

Q What do you mean by that?

A The speed the track should be—track speed.

Q I assume at the Cook Street crossing that these circuit termination shunts are located 1500 feet north of the Cook Street crossing?

A That's right. Also south.

A Also south 1500 feet. And that is based on an assumed speed of what?

[11] A 40 miles per hour giving a warning time of 25 seconds.

Q And I assume that you tested the circuit termination shunts and the phase motion detector and found it to be operational?

A I did.

Q You found it to be operating and functioning properly?

A I did.

Q There was nothing wrong with it?

A That's correct.

Q And it is your opinion that on the morning of February 24, when this southbound locomotive engine number 3120 crossed the circuit termination shunts activating the phase motion detector it was operating properly?

A That's my opinion, yes.

Q How long did your testing on the circuit termination shunts and the phase motion detector take that morning?

A Approximately 20 minutes.

Q Were you required to file a report on its function?

A The signal maintainer, that was his responsibility.

Q Who was that, Mr. Sheriff?

A Dale Sheriff.

Q Was he there with you that morning?

A No, he had already left when I arrived.

* * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
ROME DIVISION

Civil Action Case No. 4:88-CV-0141-RLV

MRS. LIZZIE BEATRICE EASTERWOOD,
Plaintiff,
v.

CSX TRANSPORTATION, INC.,
Defendant.

13595 South Dixie Highway
Miami, Florida
September 12, 1989
10:15 A.M.-2:00 P.M.

DEPOSITION OF WILLIAM FOGARTY, PHD

Taken before THOMAS R. NEUMANN, Registered Professional Reporter and Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed in the above cause.

* * * *

[50] Q. Did you do anything at all in this case between September 12, '88 and March 8, '89?

A. Nothing that would amount to call my attention to recording that activity. I don't have any recording of any activity. I would have to say no.

Q. What did you do on March 8, '89?

A. I believe I made some calculation relative to train speed. That may have been in May. I'm not certain if

it was in March or May that I did calculation on train speed.

Q. What calculations did you do on train speed, whether it was in March or May?

A. The last sheet I provided to you that has "Speed" written on the top of it—and unfortunately I didn't date the thing—indicating a 549 foot distance from impact to final rest, being given to me hypothetically.

And I then calculated that the probable train speed based upon braking at the time of impact would be in the range of 38 to 45 miles an hour with a probable around 40 or 42 miles an hour.

* * * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
ROME DIVISION

Civil Action File No. 4:88-CV-0141-RL

MRS. LIZZIE BEATRICE EASTERWOOD,
Plaintiff,
v.

CSX TRANSPORTATION, INC.,
Defendant.

THE DEPOSITION OF ARCHIE C. BURNHAM, JR.
taken by the Defendant; before Tracy A. Cooper, Certified Court Reporter and Notary Public; commencing at approximately 10:30 a.m., on August 14, 1989 in the offices of Parker and Lundy, Cedartown, Georgia.

Q Now, a railroad company cannot install a traffic control device at a railroad crossing without the DOT's approval; is that right, sir?

A Yes, sir, that's right.

Q And that's even including bells, lights and gates?

A That's correct.

Q Okay.

A And the purpose for that is to assure that the proper standards that are most current are being applied in the design that's being implemented at that spot. So even if you used 100 percent private money, you would still need to coordinate that installation through the Department of Transportation. In fact there's nothing to prohibit that, the use of private money if you have a need that's different than the priority rating that would be determined by the department.

Q If such a situation if a railroad company were to approach DOT to say, "We're going to use private money to install traffic control devices," it still could not be done unless those particular types of devices, plans, or whatever were approved by the DOT?

A That's correct.

* * * *

Q What I'm asking is if a railroad company had come to the DOT and said, "We want to put up gates, bells and lights at a crossing other than one that was on the priority list." DOT's policy would be to say, "We want you to do the one, your crossing that's the highest on your priority list."

A Absolutely not. No. The Department would approach that request in accordance with the same design criteria that they would the one that was on the list. But they would, and during my time did, approve installations that were not on the priority list as a request of the railroad.

Q Okay.

A But there were few requests.

Q You are aware are you not, Mr. Burnham, that as you said earlier back in the early '80s or whatever there was discussion about installing gate arms at the Cook Street crossing in Cartersville?

A Yes, sir.

Q And that there was some work done on drawing plans?

A Yes, sir.

Q And that those plans were the original plans that were submitted that the DOT did not approve those plans?

A Are you speaking of the submission of the seven crossings at one time?

Q I'm right now speaking of the submission for the plans of installing gate arms at the Cook Street crossing in the early 1980s?

A I think prior to that is what I'm keying on. In 1980 itself there was a first submission by the railroad asking that a system of seven be incorporated with upgrade. And that agreement was approved at DOT to proceed. As we proceeded with getting estimates back and so forth there were modification that were made that singled out the Cook Street crossing by itself, and continued negotiations to bring that into fruition.

Q Specifically talking about on the Cook Street crossing in 1981 that the DOT specifically said that, no, these plans in whatever form they were for installation of gate arms were not approved because it would impede turning traffic off of that state highway onto Cook Street?

A I think I know what you are referring to, but I don't recall it being in the form of DOT not approving it. I think DOT said that it had to be further modified and found that the modification involved either rechannelization of traffic islands to allow the truck turning movements, or implementation of a different gate arm that involved relocation of some transmission wires through the crossing. And as I recall, it left the status at that point with the request to the railroad to relocate the transmission problems so that the revised gate standard could be continued on.

Q All right. In 1981 do you remember a Mr. Jerry Gossett was a DOT engineer?

A Yes, sir.

Q Do you remember his communicating to you that the plans for gate arms at Cook Street were unacceptable at that time?

A For the reasons that I just mentioned, yes, sir.

Q Do you remember the City of Cartersville expressing saying that the plans were unacceptable because of impeding the turning of the traffic of what have you off of that road?

A That's what I was trying to refer to, yes.

Q At that point in time did the railroad company refuse to do anything to cooperate with the DOT in any fashion?

A Well, I believe what I found out was that the railroad did continue to cooperate in relocating the transmission line that I was speaking of, but that wasn't reported back and uncovered until severe years later when a fatal accident occurred at the crossing.

Q Is there anything that the railroad did that you felt like was either wrong or unacceptable or not co-operating?

A Well, I think it's unfortunate that from the initial exploration and agreement between the railroad and the Department and local government and everybody else that an upgrading was warranted there that so much time elapsed before anything could be done.

Q Are you assigning responsibility of that to the railroad?

A Well, I think that's where the responsibility is all the time, as we just discussed with. And my comments about being unfortunate is that I believe it would be an improved condition to have gates added to that crossing. It's unfortunate that that hadn't occurred yet.

(Whereupon, court reporter marked document referred to as Burnham Exhibit No. 1.)

Q Mr. Burnham, let me show you what we marked Burnham Deposition Exhibit No. 1. Mr. Burnham, the document, the exhibit that we marked as Burnham Exhibit 1, you recognize that as a memo from you to Mr. Brown?

A Yes.

Q And September 24, 1984?

A Yes, sir.

Q And that's a memo where you indicated that, "We have been unable to work out an acceptable design for the railroad crossing location at Cook Street."?

A Yes, sir.

Q Do you remember what prompted that particular memo?

A Yes, sir.

Q Tell me that, please, sir?

A Well, basically because of the sluggishness in the line to clear design problems and other administrative difficulties from the railroad side and be able to move these projects through to completion, we were in danger of losing the money that had been earmarked for this program. And on that date we took a review of which projects were apparently being delayed, identified them and withdrew the money that had been earmarked to pay for those projects and assembled them in a lump sum that could be used on another phase of the program that could be implemented immediately, in this case being the installation of prefabricated crossings.

Q With regard to your statement they had been unable to work out an acceptable design, are you saying that it was because of the railroad or because of any other factors that you were unable to work out an acceptable design?

A The letter doesn't say why it wasn't able to work out a suitable design, but you and I were discussing just before this exhibit that the Jerry Gossett input had indicated that there were some difficulties in either applying the intersection redesign that had been established in the plans, it was not compatible with the City of Cartersville, or solving the problem with a reworking of the crossing on behalf of the railroad. And my recollection is that that resolved itself in a request to the railroad to rework that transmission line so that we could continue on with the bells, lights, gates design, and not force the issue about the intersection traffic islands and the restrictions to the trucks.

Q I'm trying to make sure I understand. Are you saying that—did the railroad not comply with any request that you made in terms of what you had asked them

to do with regard to redesigning the plans or design or what have you?

A No, I think this decision just reflects that it became obvious that it was not going to be something that would be solved immediately, and thus for the temporary problem of addressing the funding situation that the best decision was to put this project in the category with many other projects where the money could be withdrawn and respent and reauthorized at a later time when those problems were solved.

Q What I'm trying to make sure I understand, though is that I want to know what your testimony is as to whether or not at the time there was anything that the railroad either refused to do or didn't do in terms of what the DOT had asked them to do about reworking the designs or plans or whatever to come up with an acceptable plan?

A I think that's obviously that, yes, the railroad had to carry the ball in one particular item or the city would have to carry the ball in another particular item, i.e. the intersection design, and that neither one was moving. And so the Department's decision was to withdraw the money until it could be worked out which way to do it. I subsequently learned that the railroad determined that they would be able to change the transmission line and they subsequently did and then we continued on with the project.

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EXHIBIT

DEPARTMENT OF TRANSPORTATION
STATE OF GEORGIA

INTERDEPARTMENT CORRESPONDENCE

Office Atlanta, Georgia

Date September 24, 1984

File RRP-000S (206) Bartow County
From Archie C. Burnham, Jr., PE,
State Traffic and Safety Engineer
To Drew A. Brown,
State Transportation Programming Engineer
Subject Railroad Crossing Funds Transfer

We have been unable to work out a suitable design for the railroad crossing located at Couk Street in Cartersville, Bartow County, RRP-000S (206). Therefore, I request that the remaining PE and all construction funds programmed for this crossing be transferred to an active project.

I request that these funds be transferred to cover the cost for installing a pre-fab rubber crossing at the SR 61, (Main Street), multi-track crossing in Cartersville, Bartow County, AAR No. 340441K.

Please take the necessary steps to accomplish this funds transfer. I am attaching location maps and data sheets for these crossings.

If additional information is necessary, please contact Wendell Hester of my staff.

ACB:WAH:to

Attachments